IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM ROBERT BILL,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Civil Action No. 05-154E**
	:	**Judge Sean J. McLaughlin**
TROOPER VICTOR J. STERNBY,	:	
	:	
Defendant.	:	

DEFENDANT'S PRETRIAL STATEMENT

AND NOW comes defendant Trooper Victor J. Sternby, by his attorneys , Thomas W. Corbett, Jr., Attorney General, Mary Lynch Friedline, Senior Deputy Attorney General, and Susan J. Forney, Chief Deputy Attorney General, Chief, Litigation Section, and submits the following Pretrial Statement pursuant to L. R. 16.1.4A:

1. STATEMENT OF MATERIAL FACTS FOR TRIAL

This case arises from a drunk driving arrest in the early morning hours of February 22, 2003, after defendant Trooper Sternby and his partner found Plaintiff, William R. Bill, and a passenger asleep in a truck that was stuck in a snow bank. During the course of the officers' investigation for possible DUI violations, Bill fell to the pavement and struck his head. Bill does not recall anything about what happened that morning.

Fortunately, there is a patrol car video of the arrest. Although Sternby and his partner arrived at the scene and activated the video camera at approximately 6:23:09 a.m., Bill did not fall until nearly ten minutes later, at 6:32:49 a.m. During those ten minutes, Sternby had the opportunity to observe Bill closely as he was awakened, as he exited the car and put his coat on, as he found his license and registration documents, as he answered questions such as when he got there and how long he had been there, and as he attempted to perform field sobriety tests. The video plainly reflects that Bill stood without apparent difficulty during this time, with his hands in his coat pockets. This was in stark comparison to his passenger, who had difficulty standing and walking as soon as he exited the vehicle.

As reflected in the video, Sternby walked away from Bill at 6:25:48 and went back to the patrol car to reposition the camera toward the road for field sobriety tests (FST's). For the next four minutes, the officers were talking with Bill and his passenger next to the truck and out of camera view, going over their license and registration information. Bill did not have problems standing during this period.

At 6:30:25, Sternby moves with Bill to the road, into full camera view, to start field sobriety tests. Bill refused to try the one-leg stand, and when Sternby demonstrated the walk and turn test, Bill could not follow Sternby's instructions. The FST's with Bill last a little over two minutes, until 6:32:40, when Sternby starts to escort Bill back to the front of the patrol car, walking slightly to the side and front of Bill, without holding or supporting him. Sternby planned on having Bill wait at the front of the car, in view of the camera and away from possible traffic hazards, while he went to the back seat to retrieve the preliminary breath testing machine (PBT). Seconds later, as Bill reaches the front of the car and Sternby starts to turn away, Bill just falls over, without making any overt attempt to catch himself. This was the first and only time during the ten minutes of investigation that Bill had stumbled or fallen.

Sternby and his partner were responding to a routine call that day when they found Bill and his passenger asleep in a truck. Sternby proceeded with field sobriety tests as he would with any suspected drunk driver. He did not automatically assume that Bill was highly intoxicated and arrest him, recognizing that people wakened from a deep sleep can be disoriented and confused. Sternby had participated in over 200 DUI arrests during the course of his 15-year career as a trooper, yet never had an experience where someone (even with a higher blood alchohol level) simply passed out or fell over without attempting to catch or stop himself.

During the course of his investigation Bill did not give Sternby any reason to suspect that he was going to fall. Bill may have been unsure of his footing at times, but it was nothing extraordinary, and Sternby never held or supported Bill during the entire investigation because there was no need. There was no stumbling, tripping or problems standing alone until after nearly ten minutes had passed, when Bill appeared to pass out at the front of the patrol car, without making any effort to catch himself. Above all, the video clearly shows that Sternby performed his duties respectfully, without game playing, mocking or teasing.

2. STATEMENT OF LEGAL ISSUES

a) State-Created Danger

The essence of Bill's claim is that Defendant Sternby acted with deliberate indifference when he required Bill, who was highly intoxicated, to undergo field sobriety tests and stand alone at the front of the patrol car while Sternby retrieved a preliminary breath testing machine from the back seat. Bill’s claim is predicated upon the state-created danger theory which permits recovery in extremely limited circumstances, when state action affirmatively creates a dangerous condition which causes injury to a protected individual. Bright v. Westmoreland Co., et al, 443 F.3d 276, 281 (3d Cir. 2006).

Under the state-created danger theory, Bill must establish that (1) the harm ultimately caused by Sternby was foreseeable and fairly direct; (2) Sternby acted in willful disregard for the

Bill's safety of the plaintiff, *i.e.*, with a level of "gross negligence or arbitrariness" that shocks the conscience; (3) Bill was a foreseeable victim; and (4) Sternby affirmatively used his authority to create an opportunity that otherwise would not have existed for the harm to occur. Bright, 443 F.3d at 281; *see also* Smith v. Marasco (Marasco II), 430 F.3d 140, 152 (3d Cir. 2005); Smith v. Marasco (Marasco I), 318 F.3d 497, 506-509 (3d Cir. 2003).

Defendant has filed a Motion for Summary Judgment as the record does not support a finding of willful disregard (element #2), that Sternby created the opportunity for the harm (element #4) or that the harm was foreseeable and fairly direct (#1).

At trial, the defense will show that, far from arbitrariness that shocks the conscience, the evidence demonstrate's Sternby's attentiveness to Bill's safety and rights throughout the arrest process. Sternby does not force Bill to take steps or make dangerous moves; he remains close to Bill at all times; Sternby places Bill at the front of the patrol car because he considered it an area of safety and so that Bill can remain in camera view; Sternby does not attempt to control or influence Bill's movements.

Moreover, there is no question that Bill placed himself in an extremely dangerous position when he got into his truck and attempted to drive while admitted highly intoxicated. He could not be permitted to just "sleep it off" on the side of the road, where he could conceivably suffer from exposure, or potentially wake up and continue driving while in a state of "extreme intoxication." Sternby's decision to have Bill exit the vehicle and submit to proper tests was entirely consistent with procedures for the lawful arrest of one suspected of violating the motor vehicle code, and served to prevent any further infractions of the law and/or injury. Sternby did not affirmatively use his authority in a way that created a danger for Bill or rendered Bill more vulnerable to danger than he would have been had Sternby not acted at all.

b) Sternby is Entitled to Qualified Immunity

As stated in his Motion for Summary Judgment, Defendant Sternby respectfully submits that he is entitled to qualified immunity. *See* Neuburger v. Thompson, et al, 124 Fed. Appx. 703, 705, 2005 WL 19275 (3d Cir. 2005). There simply is no constitutional violation; but even if a violation is found, the right at issue was not "clearly established" at the time of the alleged violation. Id., *citing* Brosseau v. Haugen, 543 U.S. 194, 201 (2001) and Bennett v. Murphy, 274 F.3d 133, 136-137 (3d Cir. 2002).

This precise issue was before the Third Circuit in Marasco II, where the Court had previously ruled that a jury question existed as to the issue of deliberate indifference but nonetheless found that the police officers were entitled to qualified immunity. Marasco II, 430 F.3d at 156. According to the Third Circuit in Marasco II, the "salient question" to be asked "is whether the law, as it existed in 1999, gave the troopers 'fair warning' that their actions were unconstitutional. 430 F.3d at 154. The Marasco II Court recognized that as of November 1998, case law in this Circuit had established the general proposition that state actors can not abandon a private citizen in a dangerous situation, "provided that the state actors are aware of the risk of serious harm and are partly responsible for creating the opportunity for that harm to happen." Marasco II, 430 F.3d at 155. This was established in the decision of Kneipp v. Tedder, 95 F.3d 1199 (3d Cir. 1996). The Marasco II Court went on to observe, however:

> Yet, we think a reasonable officer could recognize a difference between abandoning a private citizen with whom he had come in contact and failing to prolong a two-hour search for a private citizen whom he has been unable to locate [cite omitted]. At this stage, such a difference is sufficient for the officers to be entitled to qualified immunity.

Marasco II, 430 F.3d at 155.

Here, even if a jury question could conceivably exist as to deliberate indifference, there was no "fair warning" to Sternby that requiring an individual to attempt standard field sobriety testing, or to stand at the front of a patrol car for a few seconds while a PBT is retrieved from the back seat, could be considered "conscience-shocking" if the officer suspects that the plaintiff's level of intoxication is "high." A reasonable officer simply could not draw a meaningful parallel between the officers' decisions in Kneipp (*i.e.*, sending the intoxicated wife walking home alone, without her husband's assistance, in bitter cold), and an officer's decision to place a suspected DUI driver, who had been standing without significant difficulty for nearly ten minutes, at the front of the patrol car, in camera view, while the officer took several steps away to retrieve a PBT.

Plainly stated, the Third Circuit in Kneipp said nothing about the ongoing management of a suspect in detention. The conduct at issue in that case was the officers' decision to send the intoxicated woman home, on foot, without escort. The Court never suggested that it was wrong to detain the couple and speak with them, or dangerous to allow the wife to lean against the front of the car while talking to the husband, due to her high level of intoxication and the risk of falling. Kneipp, 95 F.3d at 1201. Defendant Sternby submits that nothing in the state of the law with respect to state-created danger as of 2003 would have given him reason to believe that his conduct of the investigation and arrest was anything but proper and reasonable.

3. WITNESSES

a) Witnesses defendant expects to call at trial:

Plaintiff	(Liability and Damages)
Trooper Victor Sternby Troop E – PA State Police 11176 Murray Rd. Meadville, PA 16335	(Liability)
Trooper John Dennis Troop E – PA State Police 11176 Murray Rd. Meadville, PA 16335	(Liability)

b) Witnesses defendant may call if the need arises:

Robert W. Joyce 21487 Phelps Rd. Meadville, PA 16335	(Liability and Damages)
Tom Phelps Phelps Road Meadville, PA	(Damages)
Sgt. Mark E. Schau PA State Police Troop E – Girard 5950 Greenville Rd. Girard, PA 16417	(Liability)
Lt. Douglas A. McGee Commanding Officer (Acting) Troop E- Erie 4320 Iroquois Ave. Erie, PA 16511	(Liability)
Martin Decker, D.O. 105 Mead Ave. Mead Professional Bldg. Meadville, PA	(Damages)

Conrad Toledano, MD (Damages)
Northshore Clinical Assoc.
143 East 2d Street
Erie, PA 16511

Jeffrey Levine, MD (Damages)
c/o Hamot Medical Center

Peter Lultschik, MD
c/o Meadville Medical Center
751 Liberty St
Meadville, PA

All witnesses identified in Plaintiff's Pretrial

4. DEPOSITION DESIGNATIONS (None)

5. EXHIBITS

A - Video of 2/22/03 arrest (Sternby Depo. Exh. 3)

B - Bill Arrest-Intoxication Report (Sternby Depo. Exh. 1)

C - Bill criminal complaint (Sternby Depo. Exh. 2)

D - Joyce Arrest-Intoxication Report

E - PSP General Investigative Report #2003-133 and supplements

F - Photographs captured from VHS tape

G - Plaintiff's medical records, including MEMS records

H - Plaintiff's Social Security Disability application and records

G - PSP Academy DUI Detection/Basic Field Sobriety Testing outline

6. EXPERTS – None expected

Respectfully submitted:

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Attorney General

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